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IN THE

Supreme Court of the United States

October Term, 1960.

No. 227

LINUS C. PAULING, BERTRAND RUSSELL, CARL PAUL LINK, H. C. DUNN, CLARENCE E. PICKETT, WILLIAM BROSS ALLEN, JR., NORMAN THOMAS, STEPHANIE MAY, L. JOHN COLLINS, G. MICHAEL SCOTT, HIROAKI NAKATANI, TAKASHI SUZUKI, YAEL MATSUSHIMA, BROCK CHISHOLM, ELTON NUMMELLER, ANDRE BROCHE,

Petitioners,

vs.

J. S. McELROY, Secretary of Defense of the United States; JOHN A. McCONE, Chairman of the Atomic Energy Commission of the United States; WILLARD F. LIBBY, HAROLD S. VANCE, JOHN H. WILLIAM and JOHN F. FLOBERG, Members of the Atomic Energy Commission of the United States,

Respondents.

ELSE HEINE, MICHIKO SAKO, SHIICHI KAJI, KIYOSHI CHIOKA, FALEAFUI S. UTU, JOHN McGRATH, MORNA HEINE, ARABELLA HEINE, HANNAH HEINE, JONNE, MARGARET HEINE, FREDERIK HEINE, and NICOLAS, by their father and next friend, DAGFIN HEINE, JONAN MOTT, KENYE MOTT, SATHASS ANDRIKE, TEEM SNIKE, TEMSY ANDRIKE, STEVE ANDRIKE, REEMONG ANKE, and IMELDA ANDRIKE, by their father and next friend, ASS ANDRIKE,

Petitioners,

vs.

J. S. McELROY, Secretary of Defense of the United States; JOHN A. McCONE, Chairman of the Atomic Energy Commission of the United States; WILLARD F. LIBBY, HAROLD S. VANCE, JOHN H. WILLIAM and JOHN F. FLOBERG, Members of the Atomic Energy Commission of the United States,

Respondents.

Petition for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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IN NEIMOELLER, ANDRE TROCME,

Petitioners,

vs.

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CONE, Chairman of the Atomic Energy Commission of the
States; WILLARD F. LIBBY, HAROLD S. VANCE, JOHN
AHAM and JOHN F. FLOBERG, Members of the Atomic
Commission of the United States,

HEINE, MICHIKO SAKO, SHEICHI KAJI, KIYOICHI
HOKA, FALEFATU S. UTU, JOHN McGRATH, MOR
HEINE, ARABELLA HEINE, HANNAH HEINE, JONI
MARGARET HEINE, FREDERIK HEINE and MOLOKUN
, by their father and next friend, DWIGHT HEINE, JONA
MOTE, KENYE MOTE, SAILASS ANDRIKE, ITEM AN
; TEMSA ANDRIKE, STEVE ANDRIKE, KEMING AN
and IMEDIDA ANDRIKE, by their father and next friend,
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Petitioners,

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States; WILLARD F. LIBBY, HAROLD S. VANCE, JOHN
AHAM and JOHN F. FLOBERG, Members of the Atomic
Commission of the United States.

**n for Writs of Certiorari to the United States
urt of Appeals for the District of Columbia
rcuit.**

Petitioners named[1] in the above caption pray that Writs of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit, which affirmed a decision and judgment of the United States District Court for the District of Columbia dismissing the complaints. The petitioners filed two complaints which were consolidated for the purposes of hearing before the District Court and for the purpose of appeal. A single judgment was rendered therein; hence the matter is presented here on a single petition.

Opinions Below.

The order of the District Court dismissing the complaints was on the ground that they failed to state a justiciable controversy within the court's jurisdiction and further on the ground that none of the petitioners, whether citizens of this country or aliens, has standing to sue. The order of the District Court dismissing the complaint is not reported. It is set forth at page 35 of the Joint Appendix (hereinafter referred to as J.A), nine copies of which, pursuant to Rule 21(4) of this Court are being filed herewith. Pursuant to Rule 23(1)(i), a copy thereof is not appended hereto.

Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit from the District Court's order dismissing the complaints. That Court by its decision affirmed the order of the District Court (with one of the Circuit Judges concurring in part and dissenting in part). The affirmance was based on the

---

[1]There were two additional plaintiffs in the trial court: Toyohiko Kagawa and Kathleen Lonsdale. Dr. Kagawa died subsequent to the decision by the Court of Appeals; hence no petition is being filed on his behalf. Dame Lonsdale did not appeal from the decision of the District Court.

holding of the Court of Appeals that the petitioners are without standing to sue, in the context of the allegations of their own complaint. That Court further held that the District Court was correct in holding that the petitioners presented no justiciable controversy. The opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet reported. It is attached hereto as Appendix "A."

Jurisdiction.

The date of the judgment sought to be reviewed and the time of its entry is April 12, 1960. It is set forth hereafter as Appendix "B."

No rehearing was sought, nor application for extension of time within which to petition for writ of certiorari made.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1254(1); [62 Stat. 928].

Questions Presented.

1. Where complaints alleged that the defendants, the Secretary of Defense and the Chairman and members of the Atomic Energy Commission, by having detonated and threatening to detonate nuclear weapons which produced, now produce and will produce radioactive fallout, have caused harm to the plaintiffs and will cause them harm in the future, were motions to dismiss properly granted as to all or any of the plaintiffs who fall in the following categories:

A. Marshallese Islanders and a Samoan who live in the danger area within which the explosions will be conducted;

b. Alien Japanese fishermen who by reason of the explosions cannot go into their traditional fishing area for fear of death or injury and in which fishing area the fish have and will become contaminated by reason of the fallout;

c. American citizens living in the United States wherein fallout from the explosions has occurred and will occur;

d. Alien friends living in other countries wherein fallout from the explosions has occurred and will occur?

2. Do the defendants have authority from the Atomic Energy Act to explode nuclear weapons which produce radiation and radioactive debris which threaten to contaminate the air the plaintiffs breathe and the food they eat and will cause plaintiffs and their progeny genetic and somatic damage? If so, is the Atomic Energy Act Constitutional and in accord with the principle of the Freedom of the Seas?[1a]

Constitutional, Statutory, Treaty and Code Provisions Involved (Because of their length, these are set out hereinafter as Appendix "C").

1. Section 91 of the Atomic Energy Act (42 USC 2121; 68 Stat. 936);

2. 28 USC 1332; 62 Stat. 930; 70 Stat. 658 (the 1958 Amendment [72 Stat. 415] is not applicable to this proceeding);

[1a] "This question need not be decided by this Court in this proceeding, since, as we point out, *infra*, the question should more properly be decided after the presentation of facts, an opportunity we ask this Court to give petitioners by sending the case back for that purpose.

3. 28 USC 1350; 62 Stat. 934;

4. Article IV of the Treaty of Friendship and Navigation between the United States and Japan (U.S. Treaties and Other International Acts [TIAS] No. 2863; 4 UST 2063);

5. Articles 55, 56, 57, 74, 75 and 76 of the United Nations Charter (59 Stat. 1031);

6. Trusteeship Agreement for the Former Japanese Mandated Islands (61 Stat. 3301);

7. Section 4 of the Code of the Trust Territory of the Pacific Islands (pursuant to 68 Stat. 330; Executive Orders 10265 [16 Fed. Reg. 6419], 10408 [3 CFR, 1952 Supp. 110], 10470 [3 CFR, 1953 Supp. 87]).

8. Fifth Amendment to the United States Constitution.

Statement of the Case.

The complaint of *Pauling, et al. v. McElroy, et al.*, was filed under No. 806-58 in the United States District Court for the District of Columbia and upon the order dismissing, it was carried to the United States Court of Appeals for the District of Columbia Circuit under No. 14742 (hereinafter the petitioners in that case will be referred to as the *Pauling* petitioners). The complaint of *Heine, et al. v. McElroy, et al.*, was filed in the District Court under No. 1566-58 and upon dismissal was appealed under No. 14743 (those involved in the second complaint will be hereinafter referred to as the *Heine* petitioners).

By order of the District Court the two cases were consolidated for the purpose of argument (JA 39, 40) and they were also consolidated for the purpose of brief-

ing and argument in the United States Court of Appeals.

The complaints allege:

That plaintiffs (petitioners here) are natural persons, some of them citizens and residents of the United States (JA 2, 3 and 16) or citizens of Great Britain (JA 2 and 3) or of Japan (JA 2, 3 and 16) or of the Marshall Islands or of Samoa (JA 16 and 17), one of Canada (JA 3), Germany (JA 3), and France (JA 4).

That defendants (respondents here) are Secretary of Defense and the Chairman and Members of the Atomic Energy Commission (JA 4 and 17); that respondents set off a large part of the Pacific Ocean as a restricted territory in which to detonate atomic and thermonuclear weapons which create radiation and radioactive fallout and that they excluded from such large maritime territory the Japanese petitioners who made their living therein as fishermen theretofor and that they were excluded on the penalty of injury or loss of life and contamination of the fish they would catch (JA 3 and 18). As to the petitioners who are Marshallese or Samoan, the complaint alleged that the act of the respondents threatened them with direct, immediate and imminent danger of serious physical injuries as well as threaten the destruction or at least the radioactive contamination of their food supply. (JA 18). As to the other petitioners who are citizens of the United States, Great Britain, Canada, Germany, Japan and France, the complaint alleges that they in common with the other petitioners are exposed, because of the acts of the respondents in the detonation of atomic and thermonuclear weapons, to ionizing radiation causing them to be dam-

aged genetically and somatically and also causing their progeny to be deleteriously affected by the radiation brought about by the acts of the respondents; that they will be subjected to various diseases which they would not suffer but for the additional radiation brought about by the acts of the respondents. (JA 5 to 12; 22 to 25);

That in the past the respondents have set off nuclear detonations and that they have threatened to set off in the future additional detonations which have resulted and will result in radioactivity and radioactive fallout, which has and will result in various diseases to petitioners and petitioners' children and other descendants. (JA 5, 19 and 20);

That the radioactive fallout and the radioactivity is brought about by the respondents through the test detonation of nuclear materials and by the subsequent processes whereby atoms produce certain radiation by reactions of the atomic nuclei. (JA 5 and 20).

The detonation of nuclear weapons done in the past and threatened to be done in the future by the respondents inevitably cause the dissemination of radioactive materials in the troposphere and stratosphere and their being deposited therefrom on the surface of the whole earth where they contribute to the exposure of human beings, among them the petitioners, to radiation. Such exposure is both from radioactive materials outside of the human body and exposure due to ingesting the radioactive materials into humans, among them the petitioners. (JA 6 and 7, 21 and 22)

That the acts of the respondents are illegal; that they are acting without authority; or if they act with authority, then the Atomic Energy Act of 1952 (42

USC Sec. 2011 *et seq.*) under which respondents' claim to act is unconstitutional. (JA 4, 12, 13, 17, 26, 27)

The complaints, as amended, seek declaratory judgments, injunctions and damages. (JA 13, 14, 17, 28, 32, 34)

Respondents filed motions to dismiss (JA 29, 30). The United States District Court granted respondents' motions (JA 35), from which order appeal was taken to the United States Court of Appeals for the District of Columbia Circuit (JA 37), which Court affirmed the order of the District Court (Appx. B).

Reasons for the Allowance of the Writs and Argument Amplifying Same.

Petitioners' case raises important questions of Constitutional, statutory and treaty law which, as far as we know, have not been, but should be, settled by this Court.

1. This Court has never decided the important question as to whether persons, such as the Marshallese plaintiffs who are in fact and in law wards of the United States, have the right to seek redress in the Courts of the United States against action of officers of the United States which has caused and which threatens to cause loss of property, life and health;

2. This Court has never decided the important question as to whether or not citizens of a foreign country with whom this country has a treaty providing for "national treatment . . . with respect to access to the

rts of justice . . . in all degrees of jurisdiction, both
ursuit and in defense of their rights," have the right
sue in the courts of the United States for redress
inst acts of officers of the United States taking
e outside the territorial limits of this country which
ect the lives, property and ability to earn a liveli-
d of the foreign citizens;

. This Court has never decided the important ques-
as to aliens' standing to sue in the face of the
gation that the respondents by bringing about the
nation of atomic and thermonuclear weapons result-
in worldwide radioactive fallout did in effect bring
aliens within the jurisdiction of our courts because
the injuries suffered by these aliens.

. This Court has never decided the question: Does
damage resulting from radiation and radioactive
out affecting the petitioners here because of its
rmity require the Court's determination whether or
the acts of respondents are within the Constitu-
al powers of the Executive and its administrative
nts and whether or not the Atomic Energy Act au-
izes the acts of the respondents here set forth;

. This Court has never decided, in view of the
gations of the complaints here which present un-
ed and undeniable somatic and genetic damage to
petitioners, how far the concept of due process is
rolling and how much of a protection the concept of
process gives to petitioners under the circumstances
forth in the complaints.

ARGUMENT.

Preliminary Statement.

As was stated heretofore, the two complaints were consolidated and presented, briefed and argued in the District Court and in the Court of Appeals, as one. The petitioners include "8 United States citizens, 7 (now 6 [see footnote 1, *supra*]) Japanese citizens, 1 citizen of American Samoa, 16 citizens of the Marshall Islands, 1 French, 1 German, 1 Canadian and 4 British citizens. No Russian citizens" are among the petitioners. (Appx. A, p. 2, footnote 1)

Petitioners concur with the finding of the court of appeals that "no Russian citizens are plaintiffs" and that there are none among the petitioners. However, it appears incumbent upon us to point out for the information of this Court that the self-same petitioners who are now before this Court filed substantially the same complaint against the counterpart Russian authorities of the respondents here by forwarding to the Procurator-General of the U. S. S. R. on April 4, 1958 when the Pauling petitioners filed their complaint, a document requesting the Russian judicial authorities to hear the complaint and grant to the petitioners the same relief which was asked at the District Court for the District of Columbia on behalf of the Pauling and Heine plaintiffs (see New York Times April 5, 1958).

Our subsequent argument will be bottomed on the legal principle that since the respondents filed their motions to dismiss the complaints (JA 29 and 30) there stand admitted all matters well pleaded in the complaint. Among the allegations admitted are the following:

(1) That all petitioners are either citizens of the United States or are alien friends (JA 2-4 and 16 to 17);

) That the Eniwetok proving grounds constitutes rea of 390,000 square miles of the high seas in the ic, only a small portion of which is within the territory that is mandated to the United States 18);

) That those of the Japanese petitioners who are ng their livelihood as fishermen and who are alien ds are barred from entering the Eniwetok proving nds where they have regularly engaged in fishing f they were to enter the above 390,000 square miles e high seas they are in danger of being blown to or seriously injured (JA 18) and if they were to any fish in said territory such fish would be unfit uman consumption. Such petitioners are and would prived, because of respondents' acts, of their life roperty (JA 3);

) That those of the petitioners who are from the hall Islands are in direct, immediate and imminent r of serious physical injury as well as in danger e destruction or at least the contamination of their supply resulting from respondents' acts having in ast and threatening in the future to detonate c and nuclear weapons (JA 18);

) That the respondents did prior to 1958 detonate, hreaten to detonate in the future, nuclear weapons, act of the respondents resulted and will result in wide exposure of human beings to radiation in on to that of the natural background radiation and X-ray radiation resulting from the healing arts ndustry. The past and threatened future acts of the lants did and will cause worldwide fallout of radio- debris, did and will increase the radioactive ium content of the soil and the amount of con-

tamination of the food supply of the world and of the bones of human beings (JA 5);

(6) That respondents' past and future threatened acts of exploding nuclear weapons did and will cause the plaintiffs to be damaged genetically and somatically; will cause their progeny to be deleteriously affected because of the additional radiation brought about by the acts of the defendants, and, with high probability, did and will cause the plaintiffs to suffer various diseases which they would not suffer but for the additional radiation brought about by the acts of the defendants (JA 5);

(7) That from the biological point of view any quantity of radioactive fallout, no matter how small, is undesirable.

Penetrating radiation of the sort produced by radioactive fallout does harm to the human body and the pool of human germ plasm that determines the nature and well-being of future generations of human beings.

Exposure of the reproductive organs of a living organism, including a human being, results in genetic damage through the production of genetic mutations. There is no minimum amount of irradiation dose that must be exceeded before mutations occur. Mutations occur in number essentially in direct proportion to the dose of irradiation (JA 8);

(8) That the average amounts of exposure of the gonads of human beings from the tests of nuclear weapons as they have been carried out during recent years, have been estimated to be in the neighborhood of 0.1 roentgen in thirty years from external gamma radiation and additional amounts of roughly the same magnitude

haps somewhat smaller, possibly somewhat larger) internal gamma radiation of ingested cesium 137 the world-wide fallout. The effects of exposure of magnitude of the gonads of human beings to ioniz- radiation are such that some thousands or tens of sands of seriously defective children may be expect- be produced by the explosions of nuclear weapons ed out during each year at the average rate of the seven years. Some thousands or tens of thousands ldditional seriously defective children may be expect- be produced by the mutations caused by the fallout activity resulting from the explosion of a single nuclear weapon with high fission yield, inasmuch he amount of fission involved in the explosion of a e large nuclear weapon with high fission yield may qual to the average amount per year for the last years (JA 9-10);

) That there is also a high probability that dam- is being done to the health of human beings now that is comparable to the genetic damage that is produced by fallout which will impair future rations. There is a high probability that fallout activity is producing and will produce additional of leukemia, bone cancer, and other diseases that lead to thousands or tens of thousands of deaths of an beings that would not have occurred or would occur if the tests of nuclear weapons were not ed out (JA 9-10).

* * * *

e Marshallese petitioners called the attention both e District Court as well as the Court of Appeals to rustee agreement (61 Stat. 3301) pursuant to which United States administers their homeland. They itted to the courts below and they submit to the

consideration of this Court that the United States government promulgated a Code of the Trust Territory of the Pacific Islands including the Marshallese territory which promised to the Marshallese, among them the petitioners here, that their life, liberty and property will not be taken from them without due process of law and in addition thereto guaranteeing to them freedom of religion and conscience, of press, speech, assembly and petition and in general granting to them those rights which are reserved for the people of the United States pursuant to the United States Constitution and the Bill of Rights (Appx. C, 10-11).[2]

The trusteeship agreement (61 Stat. 3301) provides among others that the government of the United States will foster the development of such political institutions as are suited to the territory, that it will promote the economic advancement and self-sufficiency of the inhabitants, will promote their social and educational advancement (Appx. C 5-10).

The Japanese plaintiffs called the attention of the courts below and they are submitting to this Court that United States Treaties and Other International Acts [TIAS] No. 2863 of October 30, 1953 as a treaty of friendship, commerce and navigation between the United States and Japan provides in Article IV that:

> "1. Nationals and companies of either Party shall be accorded national treatment and most favored nation treatment with respect to access to the courts of justice and to administrative tribunals

[2]We are attempting to arrange for a copy of this Code to be lodged with the Clerk of this Court for the convenience of the Court.

l agencies within the territories of the other
rty, in all degrees of jurisdiction, both in pursuit
l in defense of their rights . . ."

etitioners submitted to the courts below and sub-
the consideration of this Court other statutes,
and codes involved, among them the Atomic
Act (42 U. S. C. 2121; 68 Stat. 980); Charter
United Nations (59 Stat. 1021) as the same per-
the issues here, as more fully will appear from
lix C.

I.

Marshallese Plaintiffs Have Standing to Sue.

Court below gave no independent consideration to
rshallese plaintiffs nor to the particular laws
s [Trusteeship Agreement for the Former Japa-
andated Islands (61 Stat. 3301; Appx. C, 5-10),
Nations Charter (59 Stat. 1031)] and Code
of the Trust Territory of the Pacific Islands
nt to 68 Stat. 330; Appx. C, 10-11)] appli
them, their status or their rights. It lumped
etitioners with all the other alien plaintiffs and
ed them with the one-sentence statement (Appx.
n: 3):

"The non-resident aliens here plainly cannot ap-
l to the protection of the Constitution or laws
the United States."[3]

[3] shall discuss below when we deal with the non-resident, non-
ese-non-Japanese, aliens the inapplicability of the case cited
ourt (*Johnson v. Eisentrager*, 339 U. S. 763) to even these

In so doing the Court Disregarded important facts[4] and legal principles.

The Marshallese plaintiffs are not "mere aliens". They are individuals as to whom the United States (which would include their courts) have a very special obligation of care and trust by reason of the United States' position as administering authority of the Trust Territory under the Trusteeship Agreement (61 Stat. 3301). As such the United States has promulgated a Code for the Territory of the Pacific Islands.[5] In this Code, the United States pledged to these Marshallese plaintiffs that they would not deprive them of "life, liberty or property" without due process of law (§4 of the Bill of Rights for Trust Territory [see page 1 of the Code].)[6]

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[4]The (Heine) complaint as to the Marshallese alleges (JA 17-18) that the defendants "are currently directing the detonation of numerous nuclear weapons, including so-called 'dirty bombs' at the Eniwetok Proving Grounds at the Marshall Islands," that these plaintiffs "are presently residents of said Marshall Islands" and that "as such, they are in direct, immediate and imminent danger of serious physical injury, as well as in danger of the destruction and/or contamination of their food supply, resulting from the threatened nuclear detonations."

[5]The Code was promulgated pursuant to authority of Congress (68 Stat. 330) and Presidential Executive Orders (10265 [note preceding 48 USC 1451; 16 C. F. R. 6419], 10408 [3 C. F. R., 1952 Supp., 110], 10470 [3 C. F. R., 1953 Supp. 87]). It is entitled "Code of the Trust Territory of the Pacific Islands"; it is addressed "To the People of the Trust Territory of the Pacific Islands," and it recites that "the eighteen chapters hereinafter set forth shall be the laws and regulations of the Trust Territory of the Pacific Islands." (See p. iii of the Code.)

[6]Other guarantees given the Marshallese in their Bill of Rights are:

(1) Freedom of religion, conscience, spirit, press, assembly, and petition;

(2) No slavery or involuntary servitude except as punishment for a crime;

In addition, Section 20 of the Code provides:

> "Laws applicable in the trust Territory. The following are declared to be in full force and to have the effect of law in the 'Trust Territory of the Pacific Islands, hereinafter referred to in the laws and regulations as Trust Territory': (a) the Trusteeship Agreement; . . ."

The Trust Agreement assures the Marshallese that (Art. 6.1; Page xiii of the Code) the United States will carry out its Trust in accordance with the "freely expressed wishes of the peoples concerned." The plaintiffs have not expressed a wish to have their lives endangered or their food supply contaminated, by the conduct complained of.

The United States covenanted (Art. 6.3 of the Trust Agreement; Page xiv of the Code) that it will "protect the health of the inhabitants." The complaint alleges the converse.

The United States agreed (Art. 6.2; page xiv of the Code) that it will "protect the inhabitants against the loss of their lands and resources." The complaint alleges their destruction by the defendants.

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(3) Protection against unreasonable search and seizure;

(4) . . .

(5) No *ex post facto* laws;

(6) No excessive bail, excessive fines, or cruel and unusual punishments;

(7) No discrimination on account of race, sex, language, or religion;

(8) Freedom of migration and movement;

(9) No imprisonment for failure to discharge contractual obligation;

(10) The writ of habeas corpus;

(11) No quartering of soldiers in private houses;

(12) Protection of Trade and property rights; and

(13) Due recognition of local customs.

The Trust Agreement incorporates certain applicable provisions of the United Nations Charter, specifically referring to some, as for example Art. 76 (See pages xii-xvi of the Code). In Executive Order 10265 (page xxviii of the Code; note preceding 48 U. S. C. 1451; 16 F. R. 6419), the United States declared that it will "carry out the obligations assumed by the United States as the administering authority of the Trust Territory under the terms of the Trusteeship Agreement approved by the United States on July 18, 1947, and under the Charter of the United Nations."

Under Art. 76(b), the plaintiffs (page vii of the Code) are entitled to have their "economic advancement" promoted (not their food supply destroyed, as alleged in the Heine Complaint) because "the interests of the inhabitants are paramount" (Art. 73; page vii of the Code).

Accordingly, in view of the above and of the admitted allegations in the complaint, it cannot really be said that these plaintiffs have no standing to sue. Clearly, the Marshallese plaintiffs are entitled to seek redress in our courts as territorial wards whom this nation has undertaken to protect from injury and to guarantee the fundamental freedoms of the Bill of Rights. *Cf. Duncan v. Kahanamoku*, 327 U. S. 304 (Hawaii); *Squire v. Coppeman*, 351 U. S. 1 (Indians); *Choctaw Nation v. United States*, 119 U. S. 1, 28 (Indians); *United States v. Rickett*, 188 U. S. 432, 443 (Indians); *Barber v. Gonzales*, 347 U. S. 637 (Filipinos).

If there be any doubt as to the right of persons such as the Marshallese to have access to the Courts of the United States—and we think there are none—such doubts, at least on a motion to dismiss, where all intendments are in favor of plaintiffs, should be resolved in favor of plaintiffs. Moreover, the fact is that the

Marshallese are our wards and in a weaker position than the American Indians, of whom the Supreme Court has not long ago said, in *Squire v. Capoeman*, 351 U. S. 1, 6:

> ". . . Doubtful expressions are to be resolved in favor of the weaker and defenseless people who are the ward of the Nation dependent upon its protection and good faith."

Certainly the issue as to the rights of the Marshallese to sue is of sufficient newness and importance to warrant the grant of certiorari.

II.

The Japanese Fishermen Plaintiffs Have Standing to Sue.

The Court below likewise disposed of the right of the Japanese fishermen plaintiffs to sue by the same one sentence (Appx. A, 3, fn. 3) statement that non-resident aliens cannot appeal to the Constitution or laws of the United States. But in so doing, the Court did not discuss the treaty between the United States and Japan and likewise failed to take into account the special facts applicable to these plaintiffs.[7]

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[7]The complaints, insofar as the Japanese fisherman plaintiffs are concerned, allege that (Heine complaint, JA 18) plaintiff and his fishing vessel "have heretofore regularly engaged in fishing on the high seas, near the Marshall Islands, and on the high seas within the said 390,000 square miles area" which defendants are using to conduct the tests, and that "plaintiff cannot enter said area for fear of being blown to death or being seriously injured; in addition the ocean waters in said area, and for many square miles in the Pacific, are, and will be, contaminated, as are, and will be, the fish in said ocean waters, resulting from the threatened nuclear detonations aforesaid."

In the Pauling Complaint (JA 3) the Japanese fisherman plaintiffs allege that they "traditionally fish in the waters of the Pacific

It is settled that alienage on the part of a plaintiff gives jurisdiction to the United States courts under 28 U. S. C. 1332 as against citizen defendants, both in actions at law and in equity. *Elder v. Whitesides*, 72 Fed. 724 (CC ED La., 1895); *Kotalla Co. v. Bones*, 186 Fed. 30, 36 (C. A. 9 1911); *DeKorzain v. First Nat. Bank of Chicago*, 156 F. 2d 858, 861 (C. A. 7 1946), cert. den. 329 U. S. 795.[8]

Moreover, the treaty between the United States and Japan specifically gives the Japanese fishermen plaintiffs the right to sue in our courts.

Article IV of the Treaty of Friendship, Commerce and Navigation between the United States and Japan,[9] provides that:

> "1. Nationals and companies of either Party shall be accorded national treatment and most

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Ocean, including the Eniwetok proving grounds, in which defendants are to conduct the nuclear explosions," that the defendants have barred them "from entering said area for the purpose of fishing; if said plaintiffs enter said area, they will do so at risk of life; moreover, any fish caught by them in said area, and about said area, will be unfit for human consumption, by virtue whereof said plaintiff will be deprived of life and property by the unlawful acts of the defendants."

[8] 28 U. S. C. 1332 provided (at the time of the filing of the complaints):

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between:
>
> "(2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> "(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.
>
> "(b) The word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

[9] Entered into force October 30, 1953 (U. S. Treaties and Other International Acts [TIAS] No. 2863; 4 UST 2063).

favored nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights . . ."

Japanese law is to the same effect.[10]

In connection with the treaty provision above mentioned it is of more than passing interest to note that by reason of its existence the *forma pauperis* provision of our own code (28 U. S. C. 1915a) was amended by the 86th Congress so as to change the word "citizen" to "person". [In the Senate Report (No. 947, Sept. 8, 1959 [to accompany H. R. 5257]; 1959 U. S. Code Congressional and Administrative News, p. 2064) it is said:

". . . (I)t [the distinction between aliens and citizens in the old forma pauperis statute] may also be in violation of various treaties entered into by the United States with foreign countries which guarantee to their citizens access of the courts of the United States *on the same terms as American citizens*. There are approximately eight such treaties in effect at the present time."[11] (Italics added)

[10]See IV Martindale-Hubbell Law Director, Japan Law Digest Aliens (1958):

"Supported by strong constitutional guarantees, an alien is now afforded virtually all of the rights of a Japanese except of political nature. An alien has equal access to the courts . . . as a Japanese. He . . . is entitled to bring tort actions against the Japanese government only if the court to which he owes allegiance makes a similar concession to Japanese nationals . . ."

[11]In the note to 28 USCA 1915 after the amendment, the treaty with Japan above mentioned is listed.

This view is supported by the opinion of the Judicial Conference of the United States whose view was communicated to the Judiciary Committee considering the bill by the Director of the Administrative Office of the U. S. Courts and by the Deputy Attorney General (1959 U. S. Code, Congressional and Administrative News, pp. 2665 and 2666).

It thus appears that the Court below in holding that the Japanese fishermen plaintiffs have no standing to sue *because* they are non-resident aliens was quite in error and completely disregarded the treaty provision which gives them the very right denied by the court.

See also 28 U. S. C. 1350 which provides:

> "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Surely, the issue as to the right of the Japanese fishermen to sue in our courts is of sufficient newness and importance to warrant consideration by this Court.

III.

The Other Non-Resident Aliens Have Standing to Sue; Johnson v. Eisentrager, 339 U. S. 763, Is Inapposite.

The court below (Appx. A 3) in a footnote disposed of the non-resident aliens who are petitioners here by stating that they "plainly cannot appeal to the protection of the Constitution or the laws of the United States. See *Johnson v. Eisentrager*, 339 U. S. 763 (1950)." The petitioners submit that the case thus relied on has no pertinency here, involving as it does the appeal to our courts when they, as enemy aliens

ghting against the American troops in China were ptured, tried by military courts and imprisoned. As stice Jackson began his opinion, "The ultimate ques- n in this case is one of jurisdiction of civil courts of United States *vis-a-vis* military authorities in deal- g with enemy aliens overseas." (P. 765).

The aliens here involved are citizens of nations endly to the United States and as it was pointed out the dissenting opinion in the *Eisentrager* case, the estrictive philosophy" incorporated in the court's inion must be compared with *Ex parte Kawato*, 317 S. 69, 63 S. Ct. 115, 87 L. Ed. 58. In the *Kawato* case unanimous opinion of this Court set forth the ra- nale on the basis of which all courts distinguish among se who may and those who may not obtain a hearing fore our courts. The rationale seems to be that this dis- ction should go only so far as it is necessary to prevent court action or the extension of the protection therefor give aid and comfort to the other side."

n the case of *Birge-Forbes Co. v. Heye*, 251 U. S. , 40 S. Ct. 160, 64 L. Ed. 280, Justice Holmes spoke the unanimous Court when he stated.

"There is nothing 'mysteriously noxious' (*Coolidge v. Inglee*, 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger v. Abbott*, 6 Wall. 532, 536, 18 L. Ed. 939, 941; *M'Connell v. Hector*, 3 Bos. & P. 113, 114, 127 Eng. reprint, 61, 6 revd. Rep. 724. Such aid and comfort were prevented by the provision that the sum recovered should be paid over to the alien property custodian and the judgment in this respect was correct. When the

alien enemy is defendant, justice to him may require the suspension of the case, *Watts, W. & C. v. Austrinca d Navigazione*, 248 U. S. 9, 22, 69 L. Ed. 100, 101, 3 A. L. R. 323, 39 S. Ct. Rep. 1.)"

Petitioners respectfully submit that in face of *Ex parte Kazato* and of *Birge Forbes Co.* the citation relied on by the Court of Appeals has no validity to the issues here. They submit that if the purpose of depriving an enemy alien, particularly one outside of the jurisdiction of the courts of the United States, of the right or privilege to rely on our courts, is predicated solely on the justiciable purpose of depriving such enemy aliens of aiding and giving comfort to the enemy, then such purpose is not present with reference to a friendly alien and of course he may not be brought under the umbrella of the *Eisentrager* decision.

Petitioners are aware that the court in the *Kazato* case as well as in the *Birge-Forbes* case bottoms the capacity to sue and be sued on lawful residence which implies protection (see *Kazato*, p. 74). However, as they will argue hereafter, "the allegations of the complaint show that respondents' acts reached out beyond the confines of the United States and thus in effect brought them within those extended borders of this country. At this time they respectfully submit the summary dismissal of the non-resident alien petitioners by the Court of Appeals on the authority of the *Eisentrager* case was error calling for correction by this Court.

In *Russian Volunteer Fleet v. United States*, 282 U. S. 481, a corporation organized under the laws of Russia sued in the Court of Claims to obtain compen-

ion for the vessels taken over by the United States ipping Board in 1917. In that case the court stated:

"As the facts alleged in the petition were admitted by the motion to dismiss, the allegation that the petitioner is a corporation duly organized under the laws of Russia stands unchallenged on the record. There was no legislation which prevented it from acquiring and holding the property in question. *The petitioner was an alien friend and as such was entitled to the protection of the Fifth Amendment of the Federal Constitution.*" (Emphasis supplied) (282 U. S. at 489)

The court further held that:

"As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other Governments . . . The question as presented here is not one of a claim advanced by or on behalf of a foreign government or regime, but is simply one of compensating an owner of property taken by the United States." (282 U. S. at 491-492)

ee also:

Hilton v. Guyot, 159 U. S. 113.

IV.

The American Citizen Plaintiffs Have Standing to Sue.

The Court of Appeals, after ruling out all the alien plaintiffs on the strength of the *Eisentrager* case, held that the American citizen plaintiffs likewise have no standing to sue because "they do not allege a specific threatened injury to themselves, apart from others, but rather set themselves up as protestants, on behalf of all mankind, against the risks of nuclear contamination in common with people generally. Standing to sue, even as to the citizen of the United States, does not arise out of such general and indefinite allegations of injury."[12] Thereafter the Court of Appeals quoted from *Mass. v. Mellon*, 262 U. S. 447, to the effect that the "party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The petitioners submit that neither the case of *Mass. v. Mellon* nor *Perkins v. Lukens Steel Co.*, 310 U. S. 113, nor *McCabe v. Atchison, T. & S. F. Ry.*, 234 U. S. 151, relied on by the Court of Appeals, have any application to the instant case. The allegations of the complaint which stand, in face of the respondents' motion to dismiss, undenied, show that each of the petitioners "has sustained or is immediately in danger of

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[12] This observation cannot, of course, be made as to the Marshallese and Japanese fisherman plaintiffs. Even if, *arguendo*, the allegations as to the American plaintiffs are "general and indefinite," the same cannot be said of the Marshallese nor of the Japanese fishermen. See footnotes 4 and 7, *supra*.

ining some direct injury as the result of" respon-
' acts. The allegations of the complaint present in-
overtible scientific facts which show that the result-
lamage to petitioners is unavoidable. The allegations
at respect are positive and as set forth with refer-
to the incurred and expected damage and injury to
etitioners, themselves. There is nowhere in the
laint to be found an "indefinite way" describing
red injury.

e infirmity in *Mass. v. Mellon* was that it was
y an attempt to obtain an advisory opinion from
Court as to the validity of a congressional enact-
which Massachusetts could or could not be subject
it desired. Additionally, as to the individual plain-
n that case, the Court felt her interest as a tax-
who would have to pay some minute sum was
nsubstantial. But these are not the cases at bar.
oners here are alleging without ambiguity, and
allegations are uncontradicted, that they in person
and are threatened with injury by the acts of re-
lents. It may be admitted that others and even the
in general may be similarly affected but that does
ake away the rights of litigants to sue for their
injury and threatened injury.

e cases at bar fall within *Fidelity National Bank
Trust Co. v. Swope*, 274 U. S. 123, 134, and *Nash-
Chattanooga and St. L. R. v. Wallace*, 288 U. S.
261-262 which distinguished *Mass. v. Mellon* and
show that even if conduct affects a large number
rsons or even the public at large, this does not
the right of such persons affected to seek relief.

itioners submit that it was error on the part of
istrict Court and the Court of Appeals to sustain

the motion to dismiss the complaint since the oft-repeated rule of this Court is that such a motion ought not to be sustained unless it is apparent from the complaint and to a moral certainty that the plaintiffs would be entitled to no relief even if all allegations of the complaint are proved. They submit as it was said in *Polk Co. v. Glover*, 305 U. S. 5, 9-10 that

> "the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity. . . . The salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable. . . ."

This Court should grant certiorari to permit these citizen petitioners to have their opportunity of proof.

V.

The Complaints Filed on Behalf of the Petitioners Presented a Justiciable Controversy.

In *Borden's Farm Products v. Baldwin*, 293 U. S. 194 the court stated that:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

"That it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint is adhered to

reat many writers on this subject.[13] The Court however, followed this inexpedient approach be- holding that there is no justiciable controversy instant case it decided that:

he relief here sought is to stop actions of the ecutive which Congress has explicitly authorized. e power of Congress to provide for the common ense, and the duty of the Executive to see to it t the laws are faithfully executed, like the ex- sive power of the Executive relating to foreign icy, are within the historic areas of political ver in which actions of the Executive and Legis- ve Branches are supreme and beyond judicial iew. The acts and powers challenged here are nly authorized by law and are not prohibited by Constitution." (Appx. A, 4)

itioners here strive to obtain their day in court. ere arguing that there is more than a reasonable d that the evidence that they were presenting ake the answer to the questions clearer." They that the allegations of their complaint which, of the motion to dismiss are undenied, were an sufficient to be accepted as a challenge to ondents' claim that their act was "explicitly

ikle, *Judicial Determination of Questions of Fact Affect- onstitutional Validity of Legislature Action* in 38 Harv. L. 924); Frankfurter, *Hours of Labor and Realism in Con- ave* in 29 Harv. L. Rev. 353 (1916); Denman, *Com- Trials of Fact in Constitutional Cases* in 21 Amer. Bar 85 (1935); Note, *The Presentation of Facts Underlying tutionality of Statutes* in 29 Harv. L. Rev. 631 (1916); *Review by Supreme Court Findings of Fact* in 35 Col. 85 (1935); Annotation, *Consideration of Extrinsic Evi- Question of Constitutionality of Statute*, 82 L. Ed. 1244.

authorized by Congress." The statement in the opinion below that the acts of the defendants complained about by the petitioners are "beyond judicial review" has frightening implications. These implications are the more frightening because such an argument leads to the conclusion that there is just no limit to executive power or upon such executive agents as the respondent Atomic Energy Commissioners, when it is claimed that their action is for the purpose of common defense. With such an affirmation of unlimited executive power one may wonder with Pericles of Athens who some 2300 years ago put forward the distinction between the state and others of totalitarian bent by saying that in Athens:

> "We decide or debate, carefully and in person, all matters of policy, holding that acts are foredoomed to failure when undertaken undiscussed. For we are noted for being at once most adventurous in action and most reflective beforehand."

Petitioners submit that the acts of the respondents complained of, if they remain undiscussed, or if they are "beyond judicial review" are foredoomed to failure, in fact they cannot but result in doom.

Petitioners are not asking this court to depart from but rather to uphold the Constitutional concept. Petitioners are asking this court to look upon the issues here represented in all their horrifying aspects. They ask this court not to permit the entrenchment of a totalitarian concept which dictates that the Government can do no wrong but rather that it be replaced again by the Jeffersonian concept which suggests that even Constitutional principles need not be straightjacketed by the Constitution.

Petitioners say with others who said it before so much better that we ought to at least attempt a judicial and then political inventiveness which in some way manages the inventiveness of our scientists. Petitioners say with others, who said it better and more convincingly that this Court cannot tolerate a world in which everything changes—every measurement, every distance, every material prospect—and only civic life remains unchanged to founder in an environment for which it was never designed.[14]

To hold as the Court of Appeals did that even in the face of the undenied allegations of the complaint in the face of the complaint's charge as to the extremely injurious effects of respondents' acts "the Executive and Legislative Branches are supreme and beyond judicial review," is to deny that the courts were in the past, and we hope will be able in the future, to find remedy where changed conditions require a departure from the ossified concept that does not fit the new form. This Court did find justiciable controversy to exist, even though it was violently denied by respondent government agents, in *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 71 S. Ct. 624 and *In re Summers*, 324 U. S. 561.

After the appeal was filed in the Court below respondents moved for an affirmance of the judgment on the ground that the suspension of nuclear weapons testing had made the possibility of future injury too remote to justify judicial intervention. The majority of the court overruled that motion because it stated that:

> "To temporize with these fundamental and well settled propositions by acting on the appellees' alternative motion and holding this case to be moot

[14] *New York Times*, 5-13-60.

> because of some current phase of the foreign policy of the United States, which is subject to change at any time, is to take some risk—however slight or remote—of casting doubt on the settled law that the questions presented by the pleadings are in that area of the law where the Executive and the Legislative are supreme. *Panama Canal Co. v. Grace Line, Inc.*, 356 U. S. 309, 317 (1958)." (Appx. A, p. 4)

Petitioners respectfully say that there is a choice; they say that a choice must be made between questioning a view of the law which says that faced with the instant issues "the Executive and the Legislative Branches are supreme" or keep on going on the slant of the past and face the future as described in the undenied allegations of the complaint.

Petitioners admit that the Court of Appeals may be correct when it refers to them as people who "set themselves up, as protestants, on behalf of all mankind, against the risks of nuclear contamination in common with all people generally." (Appx. A, 3). While they may be protestants, their protest is not unfounded and it is not all selfless as the allegations of their complaints show and they are threatened to be damaged by respondents' acts, and thus the controversy that they are presenting by the issues, are justiciable and so ought to be declared by this court to be.

VI.

Due to the Worldwide Effect of Respondents' Acts Alleged in the Complaints, the Jurisdiction of the Courts Naturally and Fairly Extended to Bring Under the Protection of Our Courts All Those Who Claim to Be Thus Injured.

As petitioners set forth in the Preliminary Statement to the Argument, the past acts of the defendants and the threatened ones to detonate further nuclear weapons are worldwide in their effect. All of the petitioners, be they Americans residing in Pasadena, California, or in New York City, New York, or in Chicago, Illinois, claim past injuries and allege future threats of additional injuries common to those petitioners who reside in England, in France, in Germany, in Japan, in the Marshall Islands or in American Samoa. In the face of those allegations the Court of Appeals erred in not extending the protection of our courts to all those who claim to be injured.

Petitioners submit that the jurisdiction of our courts follows or ought to follow the expanse of the limit within which a tortious act may be committed. Respondents reached out as it were with a fantastically long arm to bring upon the head and into the bloodstream of petitioners, be they in Japan, the Marshall Islands or in Great Britain or in the United States, the hellish results of radiation. In the face of such a reaching out over thousands of miles, petitioners submit that it requires no inventiveness, but simply the logical extension of the legal concept of jurisdiction to extend the court's protection to all petitioners herein.

This Court on March 28, 1960 in *Murphy v. Butler*, 362 U. S. 929, denied a writ of certiorari to the United

States Court of Appeals for the Second Circuit. Mr. Justice Douglas dissented because in his view "the issues involved in this case are of such great public importance that I record my dissent to the denial of certiorari." In that case petitioners lived in Long Island, New York and they asked in 1957 for an injunction restraining the respondents, "federal and state officials, from carrying out a threatened program of aerial spraying of their lands, homes, gardens and orchards with a mixture of DDT and kerosene designed to eradicate the gypsy moth, an insect injurious to forests." The petitioners alleged that the "threatened spraying was unauthorized by statute and so injurious to health and property as to violate the Fifth and Fourteenth Amendments." In that case, petitioners were given their day in court and presented evidence as to the injurious effect of the DDT spraying. In that case, the complaint was dismissed on the basis of the District Court's finding that "the spraying program which is the subject of this action, at the rate of one pound of DDT per gallon of solvent per acre, is not injurious to human health."

Justice Douglas reviewed some of the evidence and found that "the effect of DDT on birds and on their reproductive powers and on other wildlife, the effect of DDT as a factor in certain types of disease in man such as poliomyelitis, hepatitis, leukemia and other blood disorders, the mounting sterility among our bald eagles have led to increasing concern in many quarters about the wisdom of the use of this and other insecticides. The alarms that many experts and responsible officials have raised about the perils of DDT underline the public importance of this case." Justice Douglas expresses no views on the merit of the controversy but

he believes "that the questions tendered are extremely significant and justify review by this Court."

Petitioners would not be concerned individuals if they would fail, with Justice Douglas, to show concern for birds and other wildlife. However, they are as much or more concerned with human beings, including themselves.[15]

In *Murphy v. Butler, supra*, there was evidence of harmful milk given by cows which had eaten in the barns and from fields that had been sprayed with DDT. In the instant case radioactive Strontium 90, as it is alleged in the complaints, drops onto the surface of the earth from local fallout following detonation of atomic weapons. Spread over a large part of the earth by worldwide fallout, Strontium 90 is taken up by growing plants which are ingested by man and by cows and thus directly or indirectly damages humans, especially children. Strontium 90 emits beta particles which damage the tissues in the neighborhood of the bones, including the bone marrow, producing leukemia and bone cancer (JA 10-11). It is not to be gainsaid that Strontium 90 is far more deleterious in its effects on humans than is DDT and therefore petitioners submit that the questions tendered by them in their complaints justify review by this Court even if in *Murphy* they did not.

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[15] *Cf.* Matthew 6:26:

"Behold the fowls: for they sow not, neither do they reap, nor gather into barns; yet your heavenly Father feedeth them. Are ye not much better than they?"

Matthew 10:29-31:

"Are not two sparrows sold for a farthing? And one of them shall not fall on the ground without your Father.

But the very hairs of your head are all numbered.

Fear ye not therefore, ye are of more value than many sparrows."

Conclusion.

This Court has said:

> "Due process of law . . . conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society . . . . It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right . . ." *Wolf v. Colorado*, 338 U. S. 25, 27 (1949)

Petitioners submit that this case calls for such advance. The writs of certiorari should be granted.

Respectfully submitted,

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CHARLES A. STEWART,
A. L. WIRIN,
FRED OKRAND,
Attorneys for Petitioners.

APPENDIX "A."

Opinion of the United States Court of Appeals.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14742

LINUS C. PAULING, ET AL., APPELLANTS

v.

NEIL H. MCELROY, Secretary of Defense, and JOHN A. MCCONE, Chairman of the Atomic Energy Commission, et al., APPELLEES

No. 14743

DWIGHT HEINE, ET AL., APPELLANTS

v.

NEIL H. McELROY, Secretary of Defense, and JOHN A. McCONE, Chairman of the Atomic Energy Commission, et al., APPELLEES

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ppeals from the United States District Court
for the District of Columbia

Decided April 12, 1960

rancis Heisler, of the bar of the Supreme Court
s, *pro hac vice*, by special leave of court, and
. Wirin, with whom *Mr. James T. Wright* was on
, for appellants.

Mr. Donald B. MacGuineas, Attorney, Depar
Justice, with whom *Assistant Attorney Genera*
Mr. Samuel D. Slade, Attorney, Department
were on the brief, for appellees.

Before BÄZELON, BASTIAN and BURGER, *Circu*

PER CURIAM: The appellants, 39 individuals,
injunction in the District Court to restrain the
of Defense, the Atomic Energy Commission an
from detonating any nuclear weapons which
duce radiation or radioactive atomic nuclei al
are declaratory judgments that nuclear weapons
illegal and damages for injuries sustained by so
appellants.[1] The restraints thus sought to be i
the United States Government and its officers w
blast all nuclear tests everywhere including the
ing areas set aside for that purpose. It is alle
nuclear tests "will cause world-wide fallout of r
bris, . . . and will increase the radioactive stro
tent of the soil and the amount of contaminat
food supply of the world and of the bones of li
ings." The radioactive debris will be "eventually
on the surface of the earth . . . and thereby
to the exposure of human beings to radiation."
injury to appellants and others is alleged. Appell
allege that the Atomic Energy Act of 1954 is u
legal; that in any event nuclear testing is not a

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[1] 8 United States citizens, 7 Japanese citizens, 1
American Samoa, 16 citizens of the Marshall I
French, 1 German, 1 Canadian and 1 British citi
Russian citizens are plaintiffs.

[2] Damage claims would be cognizable, if at all, on
the United States, under the Federal Tort Claims
U.S.C. §§ 1346(b), 2674-80 (1958). Moreover, the co
concede that the past as well as future damages
monetarily compensable." See also 28 U.S.C. § 135

Act: that the Act unconstitutionally delegates [illegible] power since it contains no adequate standards [illegible] the tests violate freedom of the seas and the Nations Trusteeship Agreement for the Pacific

District Court dismissed the complaints on the that appellants lacked standing to sue, and held that they did not present a justiciable controversy. The appellees' motions for dismissal admit, for of the motion, all the well pleaded facts in the ts, such admissions does not, of course, embrace legal conclusions cast in the form of factual ns.

overnment on this appeal asks that the District affirmed first on the grounds that none of ap have standing to sue and second that the acts be restrained are authorized by Congress. Al ly it moves that we affirm on the ground that the atened are not imminent.

d not reach possible questions arising out of the ll pleaded or otherwise, for on the face of the the appellants are without standing to sue in the f the allegations of their own complaint. They lege a specific threatened injury to themselves, m others, but rather set themselves up as pro on behalf of all mankind, against the risks of ontamination in common with people generally to sue, even as to the citizen of the United oes not arise out of such general and indefinite s of injury. "The party who invokes the power ible to show not only that the statute [illegible] has sustained or is immediately in danger [illegible]

way "in common with people generally." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).[5]

The District Court correctly held that the appellees had no standing to sue and that the complaints presented no justiciable controversy. The relief here sought would paralyze operations of the Executive which Congress has expressly authorized. The power of Congress to provide for the common defense, and the duty of the Executive to see to it that the laws are faithfully executed, like the corresponding power of the Executive relating to foreign policy, are within the historic areas of political power in which the courts of the Executive and Legislative Branches are supreme and beyond judicial review. The acts and practices authorized here are plainly authorized by law and are not prohibited by the Constitution. To temporize with these fundamental and well settled propositions by granting the appellees' alternative motion and holding the case to be moot because of some current phase of the Cold War, which is subject to change at any time, is to take some risk, however slight or remote, of casting doubt on the settled law that the questions raised by the pleadings are in that area of power in which the Executive and the Legislative are supreme. *Hayburn's Case*, 2 Dall. 409; *Confiscation Cases*, 7 Wall. 454; *Gordon v. United States*, 117 U.S. 697, 702; *Ex parte Quirin*, 317 U.S. 1, 25; *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426; *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (concurring opinion).

Affirmed.

[5] See also *Pierce v. Carskadon*, 16 Wall. 234, 238; *Fairchild v. Hughes*, 258 U.S. 126, 129; *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939); *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161 (1914).

[6] *Bendix Aviation Corp., Bendix Radio Div. v. Federal Communications Commission*, ——— U.S.App.D.C. ———, 272 F.2d 533 (1959).

Burton, *Circuit Judge*, concurring in part and dissenting in part. The District Court dismissed the complaint for want of jurisdiction. After an appeal was filed in this court, the Government moved for affirmance of the judgment on the ground that the suspension of nuclear weapons tests had made the possibility of future injury too remote for judicial intervention. This would require us to vacate the judgment and remand the case to the District Court with directions to dismiss the complaint without prejudice. *United States v. Wunderlich*, 342 U. S. 98. Under such an order, appellants would not be prevented from instituting a new suit if nuclear weapons tests were resumed.

When appellants filed their complaint in April of 1958, the Atomic Energy Commission, with the approval of the President, had announced its intention to conduct a series of nuclear weapons tests in Nevada and the South Pacific during the spring and summer of that year. These tests were completed on October 30, 1958. The Government's affidavit shows that pursuant to a series of self-imposed moratoria the United States has not conducted any nuclear weapons tests since that time. In a recent statement on the subject, the President on December 29, 1959, said that "Although we consider ourselves free to resume nuclear weapons testing, we shall not resume nuclear weapons tests without announcing our intention at least one year in advance of any resumption."

I would grant the Government's motion. In my opinion there is not a sufficient probability that testing will be resumed to justify judicial intervention in so delicate an area as this by injunctive relief. *United States v. W. T. Grant Co.*, 345 U. S. 629 (1953); or declaratory judgment. *Atomic Energy Commission v. Wunderlich*, 344 U. S. 922. "Courts should avoid passing on questions of constitutionality even short of constitutionality that are not unavoidably pressing." *Rescue Army v. Municipal Court*, 331 U. S. 549, 574 (1947).

With respect to the count in appellant's complaint requesting damages, I would affirm the district court's dismissal on the ground that petitioner's goods named herein are immune from tort liability for customary acts taken within the scope of their *Kimball v. Stokes*, 44 F. 2d 13 (How. 86, 98 (1884

APPENDIX "B."

United States Court of Appeals for the District of. olumbia Circuit.

No. 14,742. September Term, 1959.

Linus C. Pauling, *et al.*, Appellants, vs. Neil H. IcElroy, Secretary of Defense, and John A. McCone, hairman of the Atomic Energy Commission, *et. al.* ppellees.

No. 14,743. September Term, 1959. Dwight Heine, *t al.*, Appellants, vs. Neil H. McElroy, Secretary of Deense, and John A. McCone, Chairman of the Atomic Enrby Commission, *et al.*, Appellees. Civil 800-58.

Filed April 12, 1960.

Appeals from the United States District Court for the District of Columbia.

Before: Bazelon, Bastian and Burger, Circuit Judges.

Judgment.

These cases came on to be heard on the record on ppeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, It is ordered and adudged by this court that the order of the District Court ppealed from in these cases is affirmed.

Dated: April 12, 1960.

Separate opinion by Circuit Judge Bazelon, concurring n part and dissenting in part.

Per Curiam.

APPENDIX "C."

tutory, Constitutional, Treaty and Code Provisions Involved.

Statutes

ection 91 of the Atomic Energy Act (42 USC 2121; Stat. 936):

(a) The Commission is authorized to—

"(1) conduct experiments and do research and development work in the military application of atomic energy; and

"(2) engage in the production of atomic weapons, or atomic weapon parts, except that such activities shall be carried on only to the extent that the express consent and direction of the President of the United States has been obtained, which consent and direction shall be obtained at least once each year.

(b) The President from time to time may direct the mmission (1) to deliver such quantities of special nur material or atomic weapons to the Department of fense for such use as he deems necessary in the interest national defense, or (2) to authorize the Department Defense to manufacture, produce or acquire any atomic pon or utilization facility for military purposes: *Proed, however*, That such authorization shall not extend the production of special nuclear material other than incidental to the operation of such utilization facili-

. . . . . "

8 USC 1332; 62 Stat. 930, 70 Stat. 658 (the 1958 endment [72 Stat 415] is not applicable to these proedings):

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between:

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are of additional parties.

"(b) The word 'states,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

28 USC 1350; 62 Stat. 934:

"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Treaties

Article IV of the Treaty of Friendship, Commerce and Navigation between the United States and Japan (U.S. Treaties and Other International Acts [TIAS] No. 2863):

"1. Nationals and companies of either Party shall be accorded national treatment and most favored nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights . . ."

From the Charter of the United Nations (59 Stat. 1031):

"*Article* 55

"With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

"a. higher standards of living, full employment, and conditions of economic and social progress and development;

"b. solutions of international economic, social, health, and related problems; and inter-national cultural and educational cooperation; and

"c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

"*Article* 56

l Members pledge themselves to take joint and ate action in cooperation with the Organization for hievement of the purposes set forth in Article 55."

"*Article* 57

embers of the United Nations which have or assume nsibilities for the administration of territories whose es have not yet attained a full measure of self-govent recognize the principle that the interests of the inants of these territories are paramount, and accept sacred trust the obligation to promote to the utmost n the system of international peace and security eshed by the present Charter, the well-being of the itants of these territories and, to this end:

"a. to ensure, with due respect for the culture of he people concerned, their political, economic, social, nd educational advancement, their just treatment, nd their protection against abuses;

"b. to develop self-government, to take due account of the political aspirations of the peoples, and o assist them in the progressive development of heir free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

"c. to further international peace and security;

"d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with pecialized international bodies with a view to the ractical achievement of the social, economic, and cientific purposes set forth in this Article; and

"e. to transmit regularly to the Secretary-General or information purposes, subject to such limitation s security and constitutional considerations may re-

quire, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply."

"*Article 74*

"Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters."

"*Article 75*

"The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories."

"*Article 76*

"The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

"a. to further international peace and security;

"b. to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

"c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

'd. to ensure equal treatment in social, economic, l commercial matters for all Members of the ited Nations and their nationals, and also equal atment for the latter in the administration of tice, without prejudice to the attainment of the regoing objectives and subject to the provisions Article 80."

usteeship Agreement for the Former Japanese Mandated Islands (61 Stat. 3301)

"PREAMBLE

EREAS Article 75 of the Charter of the United s provides for the establishment of an inter- l trusteeship system for the administration and sion of such territories as may be placed there- by subsequent agreements; and

EREAS under Article 77 of the said Charter the ship system may be applied to territories now held mandate; and

EREAS on 17 December 1920 the Council of the of Nations confirmed a mandate for the former n islands north of the equator to Japan, to be ad- red in accordance with Article 22 of the Covenant League of Nations; and

EREAS Japan, as a result of the Second World War, sed to exercise any authority in these islands:

V, THEREFORE, the Security Council of the United s, having satisfied itself that the relevant articles Charter have been complied with, hereby resolves ove the following terms to trusteeship for the Paci- nds formerly under mandate to Japan.

"ARTICLE 1

Territory of the Pacific Islands, consisting of the formerly held by Japan under mandate in accord- ith Article 22 of the Covenant of the League of s, is hereby designated as a strategic area and under the trusteeship system established in the of the United Nations. The Territory of the Paci ds is hereinafter referred to as the trust territory.

"ARTICLE 2

"The United States of America is designated as the administering authority of the trust territory.

"ARTICLE 3

"The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

"ARTICLE 4

"The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall as specified in Article 83 (2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

"ARTICLE 5

"In discharging its obligations under Article 76 (a) and Article 84, of the Charter, the administering authority shall ensure that the trust territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end the administering authority shall be entitled:

"1. to establish naval, military and air bases and to erect fortifications in the trust territory;

"2. to station and employ armed forces in the territory; and

"3. to make use of volunteer forces, facilities and assistance from the trust territory in carrying out the obligations towards the Security Council undertaken in this regard by the administering authority, as well as for the local defense and the maintenance of law and order within the trust territory.

"ARTICLE 6

"In discharging its obligations under Article 76 (b) of the Charter, the administering authority shall:

"1. foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; shall give due recognition to the customs of the inhabitants in providing a system of law for the territory; and shall take other appropriate measures toward these ends;

"2. promote the economic advancement and self-sufficience of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication;

"3. promote the social advancement of the inhabitants, and to this end shall protect the rights and fundamental freedoms of all elements of the population without discrimination; protect the health of the inhabitants; control the traffic in arms and ammunition, opium and other dangerous drugs, and alcohol and other spirituous beverages; and institute such other regulations as may be necessary to protect the inhabitants against social abuses; and

"4. promote the educational advancement of the inhabitants, and to this end shall take steps toward the establishment of a general system of elementary education; facilitate the vocational and cultural advancement of the population; and shall encourage qualified

students to pursue higher education, including training on the professional level.

"ARTICLE 7

"In discharging its obligations under Article 76 (c), of the Charter, the administering authority shall guarantee to the inhabitants of the trust territory freedom of conscience, and, subject only to the requirements of public order and security, freedom of speech, of the press, and of assembly; freedom of worship, and of religious teaching; and freedom of migration and movement.

"ARTICLE 8

"1. In discharging its obligations under Article 76 (d) of the Charter, as defined by Article 83 (2) of the Charter, the Administering authority, subject to the requirements of security, and the obligation to promote the advancement of the inhabitants, shall accord to nationals of each Member of the United Nations and to companies and associations organized in conformity with the laws of such Member, treatment in the trust territory no less favorable than that accorded therein to nationals, companies and associations of any other United Nation except the administering aiuthority.

"2. The adninistering authority shall ensure equal treatment to the Members of the United Nations and their nationals in the administration of justice.

"3. Nothing in this Article shall be so construed as to accord traffic rights to aircraft flying into and out of the trust territory. Such rights shall be subject to agreement between the administering authority and the state whose nationality such aircraft possesses.

"4. The administering authority may negotiate and conclude commercial and other treaties and agreements with Members of the United Nations and other states, designed to attain for the inhabitants of the trust territory treatment by the Members of the United Nations and other states no less favorable

than that granted by them to the nationals of other states. The Security Council may recommend, or invite other organs of the United Nations to consider and recommend, what rights the inhabitants of the trust territory should acquire in consideration of the rights obtained by Members of the United Nations in the trust territory.

"ARTICLE 9

"The administering authority shall be enttiled to constitute the trust territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction and to establish common services between such territories and the trust territory where such measures are not inconsistent with the basic objectives of the International Trusteeship System and with the terms of this agreement.

"ARTICLE 10

"The administering authority, acting under the provisions of Article 3 of this agreement, may accept membership in any regional advisory commission, regional authority, or technical organization, or other voluntary association of states, may co-operate with specialized international bodies, public or private, and may engage in other forms of international co-operation.

"ARTICLE 11

"1. The administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory.

"2. The administering authority shall afford diplomatic and consular protection to inhabitants of the trust territory when outside the territorial limits of the trust territory or of the territory of the administering authority.

"ARTICLE 12

"The administering authority shall enact such legislation as may be necessary to place the provisions of this agreement in effect in the trust territory.

"ARTICLE 13

"The provisions of Articles 87 and 88 of the Charter shall be applicable to the trust territory, provided that the administering authority may determine the extent of their applicability to any areas which may from time to time be specified by it as closed for security reasons.

"ARTICLE 14

"The administering authority undertakes to apply in the trust territory the provisions of any international conventions and recommendations which may be appropriate to the particular circumstances of the trust territory and which would be conducive to the achievement of the basic objectives of Article 6 of this agreement.

"ARTICLE 15

"The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

"ARTICLE 16

"The present agreement shall come into force when approved by the Security Council of the United Nations and by the Government of the United States after due constitutional process."[*]

Code

From Code of the Trust Territory of the Pacific Islands (pursuant to 68 Stat. 330; Ex. Orders 10265 [16 Fed. Reg. 6419], 10408 [3 FR. 1952 Supp. 110], 10470 [3 FR. 1953 Supp. 87]).

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*Approved by the Security Council of the United Nations, Apr. 2, 1947; and by the Government of the United States of America, July 18, 1947. (61 Stat. 3301)

BILL OF RIGHTS

Section 4:

"No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation; . . ."

Fifth Amendment to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ."